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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, NOVEMBER 7, 2002

PETITION OF

ADELPHIA COMMUNICATIONS
CORPORATION

CASE NO. PUE-2002-00488

For application of § 56-466.1
of the Code of Virginia to pole
attachment practices of
Northern Virginia Electric
Cooperative

ORDER ESTABLISHING PROCEEDING

On September 11, 2002, Adelphia Communications Corporation ("Adelphia") filed with the State Corporation Commission ("Commission") the above-captioned Petition against Northern Virginia Electric Cooperative ("NOVEC"). Adelphia seeks the Commission's intervention in failed pole attachment rate negotiations with NOVEC and requests the Commission to invoke its authority pursuant to § 56-6 of the Code of Virginia ("Code")¹ to issue an order:

¹ § 56-6 of the Code provides in part:

Any person or corporation aggrieved by anything done or omitted in violation of any of the provisions of this or any other chapter under this title, by any public service corporation chartered or doing business in this Commonwealth, shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission, sitting as a court of record.

(1) requiring NOVEC to maintain Adelphia attachments on its poles while a new agreement is negotiated (and, of course, thereafter pursuant to the terms of the agreement and Virginia legal requirements);

(2) requiring NOVEC's adoption of a reasonable pole attachment rate that does not distinguish between fiber optic cable and coaxial cable (which by no means exceeds NOVEC's previous rate for coaxial cable attachments);

(3) requiring NOVEC's attachment policies to avoid discrimination on the basis of technology used and permitting the attachment of coaxial cable, fiber optic cable or other types of attachments without penalty or a change in rate; and,

(4) requiring that the terms of the new agreement be consistent with the reasonableness and other requirements of § 56-466.1.²

Adelphia further alleges in its Petition, among other things, that NOVEC is subject to the Commission's jurisdiction "with regard to its pole attachment dealings," pursuant to § 56-231.34 of the Code.³

On October 2, 2002, NOVEC filed its Answer and Opposition to Adelphia's Petition. NOVEC's contentions include that Adelphia's requested relief falls outside the limited oversight

² Petition, p. 5.

³ Petition, p. 4. Adelphia relies upon the following portion of §56-231.34:

The regulated utility services of a cooperative shall be subject to the jurisdiction of the Commission in the same manner and to the same extent as are

authority granted to the Commission in § 56-466.1 of the Code. With regard to the Commission's jurisdiction, NOVEC further contests the factual basis warranting the application of § 56-466.1 B and C and the standing of Adelphia to bring its Petition.

On October 17, 2002, Adelphia additionally filed a Motion for Leave to File Reply to NOVEC's Answer and Opposition. Adelphia asserts that NOVEC's Answer and Opposition went well beyond merely providing an answer or denial to Adelphia's Petition, and essentially was a motion for summary judgment. Also on October 17, 2002, Adelphia filed its Reply. Adelphia cites § 12.1-13 of the Code to urge the Commission to exercise its broad grant of authority.⁴ Adelphia further urges in its Reply that the requirement of § 56-466.1 "that utilities provide access to cable operators upon reasonable rates, terms, and conditions is meaningless if not enforceable."⁵

regulated utility services provided by other persons under laws of this Commonwealth.

⁴ § 12.1-13 of the Code provides in part:

In the administration and enforcement of all laws within its jurisdiction, the Commission shall have the power to promulgate rules and regulations...to enter appropriate orders, and to issue temporary and permanent injunctions.

⁵ Reply, p. 16. Adelphia requests this Commission to enforce the statute, because the Federal Communications Commission is deprived of jurisdiction over NOVEC, a cooperative, pursuant to 47 U.S.C. § 224(a)(1).

On October 28, 2002, NOVEC filed its Opposition to Motion for Leave to File Reply. NOVEC asserts that Adelphia's claim for relief from the Commission is subject to the findings of fact made by Judge Mitchell of the Bankruptcy Court for the Eastern District of Virginia in related proceedings and that the doctrine of collateral estoppel bars Adelphia from relitigating the same facts found by Judge Mitchell. NOVEC requests that in the event the Commission accepts Adelphia's Reply, that NOVEC be allowed to further respond on the merits.

NOW THE COMMISSION, upon consideration of the pleadings and the applicable law, finds as follows. We deny Adelphia's Motion for Leave to File Reply and, in turn, Adephia's Reply and NOVEC's Opposition to Motion for Leave to File Reply are moot. Rule 5 VAC 5-20-100 B of the Commission's Rules of Practice and Procedure do not provide for such filings, and good cause has not been shown to waive the rule.

We assign this matter to a Hearing Examiner, pursuant to 5 VAC 5-20-120, for further proceedings as discussed below. This case will address, among other things, the applicability of § 56-6 of the Code and whether NOVEC has violated § 56-466.1 B of the Code. Section 56-466.1 B states as follows:

Upon request by a telecommunications service provider or cable television system to a public utility, both the public utility and the telecommunications service provider or cable television system shall negotiate in

good faith to arrive at a mutually agreeable contract for attachments to the public utility's poles by the telecommunications service provider or cable television system. (Emphasis added.)

In its Petition, Adelphia asserts that it has sought negotiations with NOVEC and that the rates NOVEC requested for pole attachments fall far outside the realm of reasonableness. NOVEC contends, however, that Adelphia did not seek negotiations and that § 56-466.1 B of the Code does not apply. NOVEC also asserts, if § 56-466.1 B of the Code does apply, that NOVEC negotiated in good faith and that Adelphia has not. Thus, based on the pleadings, questions of fact exist regarding compliance with § 56-466.1 B of the Code.

In addition, Adelphia asserts that NOVEC has violated § 56-466.1 C of the Code. Section 56-466.1 C states as follows:

After entering into a contract for attachments to its poles by any telecommunications service provider or cable television system, a public utility shall permit, upon reasonable terms and conditions and the payment of reasonable annual charges and the cost of any required rearrangement, the attachment of any wire, cable, facility or apparatus to its poles or pedestals, or the placement of any wire, cable, facility or apparatus in conduit or duct space owned or controlled by it, by such telecommunications service provider or cable television system that is authorized by law, to construct and maintain the attachment, provided that the attachment does not interfere, obstruct or delay the service and operation of the public utility or create a safety hazard.

NOVEC counters, among other things, that this statute is not applicable based on the facts in this proceeding. Accordingly, this case also will address the applicability of § 56-466.1 C of the Code as it relates to Adelphia's Petition.

We also note that NOVEC alleges Adelphia has not registered with the Commission, is doing business unlawfully in the Commonwealth, and has no right to invoke the Commission's jurisdiction. The proceeding established herein shall also address this allegation.

The Hearing Examiner will issue a ruling establishing an expeditious procedural schedule for this case. The Hearing Examiner will submit a report and recommendations that address: (1) the applicability of § 56-6 of the Code, including Adelphia's standing to invoke the Commission's jurisdiction thereunder; (2) findings of fact regarding NOVEC's compliance with § 56-466.1 B of the Code; (3) the applicability of the provisions of § 56-466.1, including § 56-466.1 C, of the Code as it relates to Adelphia's Petition; (4) remedies (if any) available to the Commission; (5) recommended remedies (if any); and (6) other findings and recommendations as the Hearing Examiner warrants.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) Adelphia's Motion for Leave to File Reply is denied.

(2) This case is assigned to a Hearing Examiner, pursuant to 5 VAC 5-20-120, for further proceedings as discussed herein.

(3) This matter is continued.